SUPREME COURT, U. S.

AUG 31 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

TEXACO INC.,

Petitioner,

v.

EDWARD L. BEALMER and PAT BROWN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
1. The Decision Below is Inconsistent with the Standards Established by this Court in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543 (1964) Concerning the Appropriate Role of the Courts in Determining Questions of Arbitrability	7
2. The Decision Below Conflicts with Decisions of Other Courts of Appeals in which Standing to Compel Arbitration has been Determined by the Court	10
3. The Decision Below Undermines Fundamental National Labor Policy and Casts a Broad Shadow over the Process of Grievance Settlement	12
CONCLUSION	15
APPENDIX:	
A—Opinion of the Court of Appeals	1a
B—Findings of Fact and Conclusions of Law of the District Court	5a

Citations

PAGE

CASES:

Black-Clawson Co. v. *International Association of Machinists*, 313 F.2d 179 (2d Cir. 1962) 10, 11

Connecticut Lab. Rel. Div. v. *Hoisting & Portable Engineers, Local 478*, 285 F. Supp. 311 (D. Conn. 1968) 12

Ford Motor Co. v. *Huffman*, 345 U.S. 330 (1953) 13

H. K. Porter Co. v. *Local 37, United Steelworkers*, 400 F.2d 691 (4th Cir. 1968) 12

Humphrey v. *Moore*, 375 U.S. 335 (1964) 13

John Wiley & Sons, Inc. v. *Livingston*, 376 U.S. 543 (1964) 6-11

Local Union No. 12405, District 50, UMW v. *Martin Marietta Corp.*, 328 F.2d 945 (7th Cir. 1964), *cert. denied*, 379 U.S. 880 (1964) 11

Ostrofsky v. *United Steelworkers*, 171 F. Supp. 782 (D. Md. 1959), *aff'd*, 273 F.2d 614 (4th Cir. 1960), *cert. denied*, 363 U.S. 849 (1960) 11

Parker v. *Borock*, 5 N.Y.2d 156, 156 N.E.2d 297, 182 N.Y.S.2d 577 (1959) 11

Procter & Gamble Independent Union v. *Procter & Gamble Mfg. Co.*, 312 F.2d 181 (2d Cir. 1962), *cert. denied*, 374 U.S. 830 (1963) 11

Retail Clerks Int'l Ass'n v. *Lion Dry Goods, Inc.*, 341 F.2d 715 (6th Cir. 1965), *cert. denied*, 382 U.S. 839 (1965) 12

United States v. *Foges*, 124 F.Supp. 543 (E.D.N.Y. 1954) 11

Vaca v. *Sipes*, 386 U.S. 171 (1967) 12

PAGE

White v. *General Baking Co.*, 263 F. Supp. 264 (D.N.J. 1964) 11

Woody v. *Sterling Aluminum Prods., Inc.*, 243 F. Supp. 755 (E.D. Mo. 1965), *aff'd*, 365 F.2d 448 (8th Cir. 1966), *cert. denied*, 386 U.S. 957 (1967), *rehearing denied*, 386 U.S. 1027 (1967) 11

STATUTES:

28 U.S.C.:

§1254(1) 2

§1441 5

29 U.S.C.:

§185(a) 5, 13

IN THE

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OCTOBER TERM, 1970

No. _____

TEXACO INC.,

Petitioner,

v.

EDWARD L. BEALMER and PAT BROWN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner Texaco Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 3, 1970.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto (Appendix A) along with the Findings of Fact and Conclusions of Law entered by the District Court for the Central District of California on September 30, 1968 (Appendix B).

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 3, 1970. This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. §1254 (1).

Question Presented

Respondents, two Texaco employees, brought suit to compel petitioner to enter into an arbitration with them over the same matter which it had resolved by collective bargaining with their labor union. The District Court dismissed the suit on the three independently sufficient grounds that (1) the employees had no standing to compel arbitration, (2) the dispute over which arbitration was sought had been settled as part of a multi-employee grievance negotiation between the employer and the employee's union and (3) the purported grievance filed by the employees was untimely. The Court of Appeals reversed, holding that none of those issues may be considered by the courts in determining whether to compel arbitration. The decision thereby relegates the development of national labor policy respecting the resolution of multi-employee grievances by collective bargaining to ad hoc arbitration. Accordingly, the question presented is:

Whether, in a suit to compel arbitration, District Courts are precluded, as a matter of law, from considering

(a) whether there is standing to compel arbitration;

(b) whether the dispute was previously resolved by settlement; and

(c) whether the matter is time-barred

and, without regard to the importance of uniform fed-

eral policy on the subject and the unfairness of compelling repeated litigation of the same controversy, must mechanically send the matter to arbitration.

Statement of the Case

In September, 1965, over forty truck drivers employed by petitioner Texaco Inc. (hereinafter called "Texaco"), including respondents Bealmer and Brown, were discharged for alleged dishonesty (R.* 43, 52). At all relevant times the General Truck Drivers, Chauffeurs & Helpers Union, Local 692 (hereinafter called the "Union") was the recognized collective bargaining representative of employees in a bargaining unit that included respondents. The Union brought grievances challenging all the discharges, and the dispute was ultimately submitted to arbitration under provisions of the collective bargaining agreement between Texaco and the Union at which the Union represented all of the discharged drivers (R. 7). On July 3, 1967, the arbitrator rendered an award upholding the discharge of five truck drivers but ruling that the evidence was insufficient to justify discharge of the others, including Bealmer and Brown (R. 51-92). He ordered that this latter group be reinstated (R. 91).

Shortly after the arbitral award was rendered, Texaco and the Union commenced collective bargaining negotiations regarding the amounts of back pay to be given reinstated employees under a clause in the collective bargaining agreement which governed back pay in such cases (R. 96). Bealmer and Brown specifically authorized the Union to represent them in these collective bargaining negotiations (R. 123, 131) and the Union repre-

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* The citation "R" refers to the record before the Court of Appeals.

sented to Texaco that it was negotiating on behalf of all reinstated employees (R. 96-97).

For an eight month period thereafter, hard bargaining ensued between Texaco and the Union over a number of difficult issues concerning the interpretation of the back pay clause. In the final settlement, Texaco accepted the Union's position on all but one issue. Texaco agreed to make good on all medical benefits and pensions as if the reinstated employees had been employed throughout the period of discharge (R. 171-174), not to deduct income earned at self-employment during the discharge period (R. 168), not to deduct any money because of delays caused by the Union (R. 169) and not to reduce back pay as a consequence of an employee's failure to mitigate damages (R. 168). In return, the Union accepted Texaco's position on one point, namely that all income (except self-employment income) earned during the discharge period should be deducted from any back pay (R. 168). An oral agreement on the terms of this settlement was reached between the Union and Texaco on March 15, 1968 (R. 98). Texaco was advised on April 11, 1968 that this agreement had been ratified by the Union (R. 98), and a written memorandum of the agreement was subsequently signed by Texaco and the Union (R. 168-170).

Of the 41 individual employees involved, all abided by the over-all back pay settlement except respondents Bealmer and Brown who had earned substantial income on after-hours jobs during their period of discharge. Respondents were, however, advantaged by other aspects of the back pay settlement. After the settlement (R. 125, 133), Bealmer and Brown attempted to disavow their representation by the Union and proceed on their own. Bealmer, the first to separately communicate with Texaco, did not purport to proceed independently from the

Union on his grievance until nine months after the arbitrator held that he was entitled to reinstatement and more than a month after Texaco and the Union had agreed on a settlement of the back pay claims. In this respect the collective bargaining agreement requires that complaints in discharge cases must be brought within one week after the discharge (R. 23) and that general grievances must be brought within 15 days "of the occurrence of the cause therefor" (R. 25). Brown purported to institute his grievance almost two months later than Bealmer.

The instant action to compel arbitration followed Texaco's refusal to accept the independently asserted grievances by respondents. The proceeding was commenced by respondents in state court and was removed by Texaco to the District Court for the Central District of California under 29 U. S. C. §185(a) (Section 301(a) of the Labor-Management Relations Act) and 28 U. S. C. §1441. Both sides then moved for summary judgment. Texaco's motion was granted and the complaint was dismissed. The Honorable Manuel L. Real in granting Texaco's motion concluded, *inter alia*, that: (1) "[Respondents] have no standing to order [Texaco] to proceed to arbitration with respect to their back pay claims"; (2) "[Respondents] are precluded from ordering [Texaco] to proceed to arbitration with respect to their back pay claims by an agreement between [Texaco] and the Union which established a formula for calculating back pay amounts owed by [Texaco] and which is binding on [Respondents]"; and (3) "[Respondents'] individual grievances with respect to their back pay claims are time-barred" (R. 323).

The District Court judgment was reversed by the Ninth Circuit Court of Appeals on the sole ground that the points upon which the District Court relied were "matters of procedure" to be decided by the arbitrator and not the court.

Reasons for Granting the Writ

The decision below sweepingly removes from the District Courts of the Ninth Circuit in suits to compel arbitration all power to determine whether there is any standing to compel such arbitration and whether such arbitration is otherwise barred by prior settlement or untimeliness. This rule is flatly inconsistent with *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543 (1964), which decided that the courts are the proper forum for the adjudication of questions concerning whether an obligation exists to arbitrate with the party seeking arbitration. It is also in conflict with a consistent pattern of decisions in other Courts of Appeals, District Courts and state courts which have held that this important question is for the court to determine.

By permitting two dissatisfied employees to take their employer to arbitration following a collective bargaining agreement between the employer and their union resolving a dispute affecting more than forty employees, a fundamental national labor policy long encouraged by this Court favoring amicable employer-union settlement of grievances is seriously undermined. If left standing, the effect of this decision will be to so impair the advantages which accrue from grievance settlement that the possibility of negotiated settlement of grievances will be significantly discouraged. This is particularly the case in instances of multi-employee grievances where individual employees may be affected in divergent respects by a negotiated grievance settlement. An employer will be ill-advised to negotiate with a union and make compromises if an individual employee still remains free thereafter to walk away from those parts of the settlement he does not like, and to require the employer to proceed to arbitration on those limited issues while the employer is effectively otherwise bound by his settlement. At the same

time, the effectiveness of union representation in grievance proceedings is also undercut.

Furthermore, this decision seriously jeopardizes uniform national labor policy. This Court, in furtherance of Congressional desire that peaceful settlement of labor grievances be encouraged, has made clear that individual employees are entitled to challenge grievance settlements made by their union only where the employee can demonstrate the union's bad faith. But this limited standard for review is not necessarily one which an arbitrator must or will follow. By permitting the development of divergent standards by arbitrators and, thereby, at the least creating uncertainty as to the ultimate status of any collective bargaining settlement, the decision below necessarily undermines what Congress and this Court have sought to achieve.

1. The decision below is inconsistent with the standards established by this Court in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543 (1964) concerning the appropriate role of the courts in determining questions of arbitrability.

In reversing the judgment of the District Court, the Court of Appeals below concluded that the issue of back pay generally was an arbitrable subject under the collective bargaining agreement. Therefore, it held that each of the alternative grounds relied upon by the District Court for refusing to compel arbitration—the lack of employee standing, the settlement bar and the untimeliness of the assertion of the grievances—"went to matters of procedure" and were to be decided by an arbitrator and not the court. This decision thus purports to establish a broad rule permitting individual employees to compel arbitration of their grievances without a prior judicial determination that they have any such right.

This conclusion is in clear conflict with principles established by this Court in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543 (1964). That case involved a suit by a union to compel arbitration which the employer defended on several grounds, among them, that (1) the collective bargaining agreement containing the arbitration clause did not survive a corporate merger of the contracting employer and the defendant employer, and (2) the union had not properly followed the initial steps in the grievance procedure prior to the arbitration step. This Court held that the first ground asserted by the employer—that the union's right to compel arbitration did not survive the merger—raised a question for the court not the arbitrator. In reaching that conclusion the Court observed:

> "The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty. Thus, just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so *a fortiori*, it cannot be compelled to arbitrate if an arbitration clause does not bind it at all." (376 U. S. at 547).

Thus the Court found that judicial inquiry in a suit to compel arbitration is two-fold: (1) is the subject matter in dispute subject to arbitration; (2) are the parties before the court obligated to arbitrate with each other. After itself having determined that the surviving company was bound to arbitrate, the Court went on to hold that "[o]nce it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." (376 U. S. at 557).

The issue in the instant case is of a character similar to that which this Court in *Wiley* held was for the courts to decide, namely whether a party has a right or obligation to arbitrate with another party. Here, the question is whether individual employees have standing to compel arbitration after designating their union to represent them throughout the grievance proceedings and whether the grievance settlement reached between Texaco and the Union covering all of the reinstated employees constitutes a bar to their action to compel arbitration. These are not procedural issues within the meaning of *Wiley*. They are questions which go to the very heart of Texaco's duty to submit to arbitration and under *Wiley* were properly heard and determined by the District Court.

A separate ground relied upon by the District Court below in refusing to compel arbitration was that the respondents' grievances were untimely filed under the contract. The Court of Appeals held that this issue also is "procedural" under *Wiley*. In *Wiley*, this Court held that, as a general rule, questions relating to procedural arbitrability should be decided by the arbitrator if they "grow out of the dispute and bear on its final disposition. . . ." (376 U. S. at 557). The Court's explanation of its holding indicates that the particular setting in which the procedural dispute arises, and not blind application of a rule of judicial adjudication, governs whether the court or an arbitrator should resolve such questions:

> "It would be a curious rule which required that intertwined issues of 'substance' and 'procedure' growing out of a single dispute and raising the same questions on the same facts had to be carved up between two different forums, one deciding after the other." (376 U. S. at 557)

Here, unlike *Wiley*, there is no intertwining of procedural and substantive issues. The issue of whether peti-

tioners timely asserted their alleged grievances is not dependent on and, in fact, bears no relation to the substantive issue sought to be arbitrated—the question of the proper amount of back pay. Here, instead, the issue of timeliness is intertwined with the questions of standing and settlement bar which the District Court properly adjudicated for itself. Therefore, under the *Wiley* rationale, the District Court also was duty bound to rule on the matter of timeliness since this question dovetailed with the standing and settlement bar issues.

In all respects, therefore, the decision below reaches a result inconsistent with the standards laid down by this Court in *Wiley*. Compounding this error is the absolute failure of the Ninth Circuit to provide any rationale for its conclusion, thus leaving the lower federal courts without basis for making distinctions between issues of arbitrability to be determined by the courts and those to be left to the arbitrator.

2. The decision below conflicts with decisions of other Courts of Appeals in which standing to compel arbitration has been determined by the court.

In promulgating a broad rule that the question of standing to compel arbitration is not for the courts, the decision below conflicts with decisions of several other Courts of Appeals which have routinely determined questions of standing. The leading decision is that of the Second Circuit Court of Appeals in *Black-Clawson Co.* v. *International Association of Machinists*, 313 F. 2d 179 (2d Cir. 1962). That case involved an attempt by an individual employee to compel his employer to arbitrate a grievance under the arbitration clause of a collective bargaining agreement. Like the District Court below, the

Second Circuit Court of Appeals in *Black-Clawson* specifically held that the employee did not have standing to compel arbitration. Thus, *Black-Clawson* itself directly supports the conclusion that the court must hear and determine a challenge to the standing of a party seeking to force another party to submit to arbitration and is in conflict with the decision here.

While *Black-Clawson* preceded *Wiley*, it correctly anticipated the proper role of the courts in adjudicating fundamental questions concerning the obligation to arbitrate. In numerous cases both prior and subsequent to *Wiley*, other courts have similarly ruled that individual employees did not have standing to compel arbitration. See, *e.g.*, *Woody* v. *Sterling Aluminum Prods., Inc.*, 243 F. Supp. 755 (E. D. Mo. 1965), *aff'd*, 365 F. 2d 448 (8th Cir. 1966), *cert. denied*, 386 U. S. 957 (1967), *rehearing denied*, 386 U. S. 1027 (1967); *Procter & Gamble Independent Union* v. *Procter & Gamble Mfg. Co.*, 312 F. 2d 181, 184-185 (2d Cir. 1962), *cert. denied*, 374 U. S. 830 (1963); *White* v. *General Baking Co.*, 263 F. Supp. 264 (D. N. J. 1964); *Ostrofsky* v. *United Steelworkers*, 171 F. Supp. 782 (D. Md. 1959), *aff'd*, 273 F. 2d 614 (4th Cir. 1960), *cert. denied*, 363 U. S. 849 (1960); *United States* v. *Voges*, 124 F. Supp. 543 (E. D. N. Y. 1954); *Parker* v. *Borock*, 5 N. Y. 2d 156, 156 N. E. 2d 297, 182 N. Y. S. 2d 577 (1959).

In several other Court of Appeals cases the question of standing to compel arbitration of parties other than individual employees was heard and determined by the court. In some, the standing of a union was challenged. Thus, *Local Union No. 12405, District 50, UMW* v. *Martin Marietta Corp.*, 328 F. 2d 945 (7th Cir. 1964), *cert. denied*, 379 U. S. 880 (1964) involved a determination by the court that a union local did not have standing to compel arbitration when the international union was the

contracting party. In *Retail Clerks Int'l Ass'n* v. *Lion Dry Goods, Inc.*, 314 F. 2d 715 (6th Cir. 1965), *cert. denied*, 382 U. S. 839 (1965), an employer defended a suit by a union for enforcement of an arbitration award, contending that the union lacked standing to pursue arbitration. Even though the arbitrator had rendered a decision in favor of the union, the Sixth Circuit refused enforcement on the ground that the union did not have standing to bring the arbitration.

The courts also have decided questions of standing to compel arbitration where unions have raised the objection. In *H. K. Porter Co.* v. *Local 37, United Steelworkers*, 400 F. 2d 691 (4th Cir. 1968), the union questioned the standing of the employer to compel arbitration and the Fourth Circuit Court of Appeals specifically adjudicated that question before ordering the dispute to arbitration. And when a union challenged the standing of an employer association—as distinguished from an individual employer—to compel arbitration, the District Court for Connecticut rejected the union's contention, explicitly holding that the question of standing was for the court and not the arbitrator. *Connecticut Lab. Rel. Div.* v. *Hoisting & Portable Engineers, Local 478*, 285 F. Supp. 311 (D. Conn. 1968).

Thus, the decision below is at odds with all prior authority in its holding that whether a party is obligated to arbitrate at the behest of a particular party is for an arbitrator to determine.

3. The decision below undermines fundamental national labor policy and casts a broad shadow over the process of grievance settlement.

This Court, in a series of cases culminating in *Vaca* v. *Sipes*, 386 U. S. 171 (1967), has recognized the unique role of the collective bargaining representative in con-

trolling the collective bargaining process. See, *e.g.*, *Humphrey* v. *Moore*, 375 U. S. 335 (1964); *Ford Motor Co.* v. *Huffman*, 345 U. S. 330 (1953). In *Vaca*, this Court held that a union's refusal to press an individual employee's grievance to arbitration is binding on the individual employee without regard to the underlying merits of the dispute, subject only to the individual employee's right to bring an action under Section 301(a) (Labor Management Relations Act of 1947, 29 U. S. C. §185) predicated on union bad faith in making that decision. The Court said:

> "If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration. This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully . . . . It can well be doubted whether the parties to collective bargaining agreements would long continue to provide for detailed grievance and arbitration procedures of the kind encouraged by L.M.R.A. §203(d), *supra*, if their power to settle the majority of grievances short of the costlier and more time-consuming steps was limited by a rule permitting the grievant unilaterally to invoke arbitration." (386 U. S. at 191-192).

This fundamental national labor policy is subverted by the decision of the Court of Appeals here. Forty-one employees, including respondents, authorized the Union to

bargain collectively over a number of issues concerning back pay. Some of those issues were common to all the employees; others were not. Without this settlement, forty-one grievances, each with separate facts and peculiar problems, would have been the subject of individual processing and might even have gone to arbitration. This could only have occasioned delay, disruption and conflict.

The effect of the decision below, if left standing, clearly will be to discourage employer willingness to settle grievances. If disgruntled employees are to be permitted to process grievances on their merits despite settlement between the employer and their union, any advantage which might accrue to the employer out of settlement with the union rather than arbitration wholly disappears. This is especially so in the case of settlement of multi-employee grievances where possible compromises having different impact on different employees are involved. An employer will be highly reluctant to enter into any such settlement if he knows that an individual employee may reject the settlement as it applies to him in whole or in part and subject the employer to an arbitration limited to the merits of that individual's grievance. The employer, having acceded to certain union requests in order to settle, may find that an arbitrator then takes from him those fruits he may have gained in the over-all settlement. Furthermore, the effectiveness of union representation in grievance processing is necessarily undermined.

It is for these reasons that this Court has in *Vaca* adopted a much narrower standard for review of settlement agreements between employers and unions—the bad faith of the union. Such a limited standard, however, is not one which an arbitrator must follow. He may rather concern himself only with the merits of the individual employee grievance. As a consequence, divergent

standards for dealing with this issue may be adopted by arbitrators throughout the country, making the development of uniform national labor policy impossible. It is respectfully submitted that this vital aspect of employer-employee relations must be subject to uniform standards established by the courts and not left to the *ad hoc* arbitration process.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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[APPENDIX FOLLOWS].

APPENDIX A

Opinion of the Court of Appeals, Dated June 3, 1970

No. 23,632

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In the Matter of Arbitration
Between
EDWARD L. BEALMER and PAT BROWN,
Appellants,
v.
TEXACO, INCORPORATED,
Appellee.

Appeal from the United States District Court
for the Central District of California

BEFORE: HAMLEY and ELY, Circuit Judges, and POWELL, District Judge*

PER CURIAM:

Edward L. Bealmer and Pat Brown brought this suit against their employer, Texaco, Incorporated, to compel

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* The Honorable Charles L. Powell, United States District Judge for the Eastern District of Washington, sitting by designation.

arbitration of a dispute over the interpretation of a back pay provision in a collective bargaining agreement. The parties made cross motions for summary judgment. Texaco's motion was granted and plaintiffs' motion was denied. This appeal followed.

Bealmer and Brown, together with thirty-eight other employees of Texaco, had been discharged for alleged dishonesty. At this time, General Truck Drivers, Chauffeurs and Helpers Union, Local 692 (union) was the recognized collective bargaining agent for these employees. As a result of arbitration proceedings under Article XIV of their collective bargaining agreement (agreement), all but five of the discharged employees were reinstated. Back pay was to be awarded in accordance with a formula set out in Article XII of the agreement.

A dispute arose as to the application of that formula. The union and the company attempted to resolve their differences without going back to the arbitrator or invoking new arbitration proceedings. It appeared that the union was willing to make a concession to Texaco on one facet of the back pay dispute which directly affected Bealmer and Brown.[1] They did not favor the concession and

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[1] The concession involved a deduction, from back pay awarded, of an amount equal to any earnings received by the employee from a "moonlighting" type job during the discharge period. This means a job in which the employee worked during hours different than those he would have worked for Texaco had there been no discharge. Both Bealmer and Brown had such jobs prior to their discharge and merely continued working at those "moonlighting" jobs during the discharge period. They assert that any deduction from the award of back pay should only be for wages earned during the discharge period at jobs which were taken as a substitute for the regular employment at Texaco.

employed private counsel, giving notice that they wished to invoke the Article XIV arbitration procedures to resolve that facet of the dispute. Texaco declined and this action followed.

The summary judgment for Texaco was predicated upon the following alternative conclusions of law:

> "Petitioners have no standing to order Respondent to proceed to arbitration with respect to their back pay claims.
>
> "Petitioners are precluded from ordering Respondent to proceed to arbitration with respect to their back pay claims by an agreement between Respondent and the Union which established a formula for calculating back pay amounts owed by Respondent and which is binding upon Petitioners.
>
> "Petitioners' individual grievances with respect to their back pay claims are time-barred."

On their appeal to this court, plaintiffs argue that their individual claims are arbitrable under Article XIV of the collective bargaining agreement, and that each of the three grounds upon which the district court relied were procedural matters which should have been left to the arbitrators.

We agree. The district court did not hold for Texaco on the ground that the Article XII dispute was not an arbitrable issue under the collective bargaining agreement. Each of the reasons the court relied upon went to matters of procedure. Since the parties were obligated to submit this dispute to arbitration, it is the arbitrator, and not the court, who is to decide questions of procedure.

Appendix A

John Wiley & Sons, Inc. v. *Livingston*, 376 U.S. 543, 557 (1964); *United States ex rel. Madison* v. *Rundle*, 422 F. 2d 49 (10th Cir. 1970).

The summary judgment for Texaco is reversed. Denial of plaintiffs' motion for summary judgment is not appealable. The cause is remanded to the district court for further proceedings. The mandate shall issue forthwith, and a petition for rehearing will not be entertained.

APPENDIX B

Findings of Fact and Conclusions of Law of District Court Dated September 30, 1968

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. 68-1135-R

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In the Matter of Arbitration

Between

EDWARD L. BEALMER and PAT BROWN

and

TEXACO, INC.

This cause having come on to be heard on September 3, 1968, before the Honorable Manuel Real, Judge Presiding, on motion of Respondent Texaco, Inc. for a summary judgment pursuant to Rule 56 of the Federal Rules of Civil Prodecure, William D. Evans appearing as counsel for Respondent, Arnold, Smith & Schwartz, by Jerome Smith, appearing as counsel for Petitioners, and the Court having considered the pleadings in the action, the affidavits submitted and having heard oral argument, and having found that there is no genuine issue of fact to be submitted to the trial Court, the Court being fully advised in the premises, make its findings of fact as follows:

Appendix B

1. Respondent Texaco, Inc. (hereinafter referred to as Respondent) is a Delaware Corporation engaged in the production, refining and marketing of petroleum products.

2. Respondent annually purchases and receives at points located within the State of California directly from points located outside the State of California products and materials valued in excess of $50,000.

3. Respondent annually sells products valued in excess of $50,000 from points located within the State of California directly to points located outside the State of California.

4. General Truck Drivers, Chauffeurs & Helpers, Local No. 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (hereinafter referred to as the Union) is a labor organization within the meaning of 29 U.S.C. §152(5).

5. From April 1, 1964 through April 1, 1966, Respondent and the Union were parties to a collective bargaining agreement which provided for *inter alia*, a grievance procedure in Article XIV thereof whereby "any employe, or group of employes, may individually or through their representatives present their grievances to Management" by initially taking a complaint to Respondent's Superintendent within "15 calendar days from the occurrence of the cause therefor" and that, after two intervening steps, "the complainant or his representative" and Respondent's representative could present a grievance to an arbitrator, and that the expenses of such arbitration should be borne equally as follows:

> (a) One-half by the Company; and (b) one-half by the complainant if acting on his own behalf, or

Appendix B

by General Truck Drivers, Chauffeurs and Helpers Union, Local No. 692, if acting as his representative, except that each party shall pay the expense of its own representative.

6. Respondent discharged Petitioner Bealmer on September 27, 1965 and discharged Petitioner Brown on September 25, 1965.

7. On October 28, 1965, and on November 1, 1965, the Union filed a single grievance on behalf of 49 individuals, including Petitioners, contending that said employes had been discharged in violation of the 1964-1966 collective bargaining agreement.

8. The interests of each of said individuals for whom the grievance was filed, including Petitioners, were represented by attorneys of the Union throughout the grievance proceedings before Arbitrator Philip G. Marshall.

9. Respondent and the Union equally divided the total cost of arbitration.

10. On July 3, 1967, Arbitrator Marshall found that 41 employes for whom the grievance had been filed were wrongfully discharged, including Petitioners, and ordered reinstatement to their positions with Respondent and the payment of back pay under the terms of the 1964-1966 collective bargaining agreement.

11. On or about July 21, 1967, Respondent offered reinstatement to the 41 aforesaid employes, including Petitioners.

Appendix B

12. On July 23, 1967, Respondent reinstated Petitioner Bealmer to his former position and on November 1, 1967, Respondent reinstated Petitioner Brown to his former position.

13. On August 25, 1967, the Union was certified by the National Labor Relations Board as the exclusive collective bargaining representative of all truck operators and warehousemen employed at Respondent's Los Angeles Sales Terminal, including Petitioners.

14. On March 15, 1968, Respondent and the Union orally agreed to the formula to be used for calculating the back pay Respondent owed to said 41 employes, and on or about April 11, 1968, said formula was ratified by the Union's membership.

15. Under the aforesaid formula, the amounts earned by Petitioners on employment prior to their respective discharges and which employment was continued during their period of discharge were deducted from the gross back pay which Respondent owed Petitioners.

16. Since April 11, 1968, Respondent has paid net back pay owed to seven of the employes who have tendered statements of the amounts earned during the period of their discharge pursuant to the agreement as to the back pay formula.

17. On June 26, 1968, Petitioners filed this action in the Superior Court for the State of California for the County of Los Angeles, under docket number 934769 for the purpose of ordering Respondent to proceed to arbitrate with Petitioners certain alleged disputes.

Appendix B

18. On July 12, 1968, Respondent removed said case to this Court, the case now carrying the above-captioned case number.

The following conclusions of law, insofar as they may be considered findings of fact, are so found by the Court to be true in all respects:

From the foregoing facts, the Court concludes:

1. The Union represents employes in an industry affecting commerce as defined in 29 U.S.C. §185(a).

2. Petitioners have no standing to order Respondent to proceed to arbitration with respect to their back pay claims.

3. Petitioners are precluded from ordering Respondent to proceed to arbitration with respect to their back pay claims by an agreement between Respondent and the Union which established a formula for calculating back pay amounts owed by Respondent and which is binding on Petitioners.

4. Petitioners' individual grievances with respect to their back pay claims are time-barred.

5. Petitioners' Petition to Order Arbitration is denied.

Dated: September 30, 1967

MANUEL REAL
United States District Judge

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IN THE

Supreme Court of the United States

October Term, 1970
No. 623

TEXACO, INC.,

Petitioner,

vs.

EDWARD L. BEALMER and PAT BROWN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPONDENTS' OPPOSING BRIEF.

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SUBJECT INDEX

	Page
Jurisdiction	1
Question Presented	1
Statement of the Case	4
Reasons for Denying the Writ	5
Conclusion	9
Appendix A. Article XIV	App. p. 1

TABLE OF AUTHORITIES CITED

Cases	Page
Black-Clawson Co. v. Int'l. Assn. of Machinists, 313 F. 2d 179	6
Galveston Maritime Assn. v. Longshoremen, 234 F. Supp. 250	9
John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543	3, 5, 8
Local 824, Carpenters v. Brunswick Corp., 342 F. 2d 792	8
Palestine Telephone Co. v. Local 1506, Electrical Workers, I.B.E.W., 379 F. 2d 234	9
Rochester Telephone Corp. v. Communication Workers, 340 F. 2d 237	8
Sterling Provision Corp. v. Butchers Union, Local 174, 71 LRRM 2046	9

Statutes	
Labor Management Relations Act, Sec. 9(a)	7
United States Code, Title 28, Sec. 1254(1)	1

IN THE

Supreme Court of the United States

October Term, 1970
No. 623

TEXACO, INC.,

Petitioner,

vs.

EDWARD L. BEALMER and PAT BROWN,

Respondents.

RESPONDENTS' OPPOSING BRIEF.

The Respondents, Edward L. Bealmer and Pat Brown, respectfully pray that the Writ of Certiorari petitioned for by Petitioner, Texaco, Inc., be denied.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 3, 1970. This Court's jurisdiction is invoked under 28 U.S.C., §1254(1).

Question Presented.

Respondents, two Texaco employees, brought suit to compel Petitioner (Texaco) to arbitrate a dispute between themselves and Texaco concerning the computation of back pay due them under the applicable collective bargaining agreement. *Article XIV of said agreement, providing for settlement of grievances, specifically gives to individual employees at their option the right to proceed to arbitration either "individually" or through their union representative.* Yet the Petition

for Writ of Certiorari herein is wholly silent concerning this critical provision of the agreement. Article XIV of the collective bargaining agreement appears as Appendix A hereto. [R. 24-26.* The provisions of the Article are summarized in Paragraph 5 of the District Court's Findings and conclusions, Appendix B, pages 6a, 7a to the Petition herein.]

Furthermore, the Circuit Court expressly held that the "individual claims" of Bealmer and Brown "are arbitrable under Article XIV of the collective bargaining agreement," *i.e.*, that the agreement expressly gives to Respondents the right, *as individuals*, to compel arbitration. (Appendix A, page 3a to Petition herein.)

Petitioner represents in the "Question Presented" portion of its Petition that at the time this suit was brought, said dispute had been "resolved by collective bargaining" between Texaco and the Union. The assertion of such prior resolution of the dispute is a flat misstatement of fact. Indisputable evidence of such misrepresentation appears at R 166, lines 28-31. Two days after the filing of this action, the Union brought its own Federal Court action to compel arbitration of the very dispute involved herein along with the similar disputes of a number of other employees. That suit of the Union was dismissed by the Union immediately after the signing of a Texaco—Union settlement agreement which provided that petitioners receive nothing in the way of back pay. [R. 168-170.] The two actions to compel arbitration, this action and the action of the Union, were filed respectively on June 25 and June 27, 1968. A full month later, on July 26, 1968,

*The citation "R" refers to the record before the Court of Appeals.

and without prior knowledge or consent of petitioners Bealmer and Brown, the Union and Texaco signed the (no recovery to Bealmer and Brown) settlement agreement which agreement Petitioner now represents *preceded* the bringing of this suit. Texaco and the Union had been notified of Bealmer's election to proceed "individually" on April 3, 1968, almost four months before the July 26 selfout agreement. [R. 168-170].

The District Court dismissed this suit on three grounds, each a determination of procedural arbitrability, *i.e.*, that (1) the employees had no standing to compel arbitration, (2) the dispute over which arbitration was sought had been settled as part of a multi-employee grievance negotiation between Texaco and the Union, and (3) the grievances filed by Respondents were untimely. The Court of Appeals reversed, holding that these were issues of procedural arbitrability, for the arbitrator under the case of *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964).

Accordingly, the question presented is:

Whether, in a suit to compel arbitration, where the dispute is substantively arbitrable between the parties to the suit, district courts are permitted to consider these issues of procedural arbitrability:

(a) Whether there is standing to compel arbitration, *i.e.*, has the standing plainly given to Bealmer and Brown by the agreement been lost by some act or circumstance relating to the processing of their grievances;

(b) Whether any agreement between Texaco and the Union deprived Bealmer and Brown of their right to proceed with arbitration; and

(c) Whether the back pay claims are time-barred.

Statement of the Case.

In September of 1965, 46 Texaco-employed truck drivers were discharged. Grievances were filed on behalf of all dischargees and the dispute was subsequently submitted to arbitration under the provisions of the collective bargaining agreement. In this arbitration the Union represented all grievants. On July 3, 1967, the Arbitrator rendered an award upholding the discharge of five drivers but finding that the discharge of all others, including Respondents Bealmer and Brown, was without cause. The award ordered computation of back pay "as provided in the labor contract." [R. 51-92, esp. 68, 69.]

The successful employees were reinstated to their jobs as ordered by the Arbitrator. However, on April 3, 1969, nine months after the award, Texaco and the Union were still "negotiating" concerning back pay. On this date Bealmer (and soon thereafter, Brown) elected under the terms of the collective bargaining agreement to proceed on his own with arbitration of the back pay dispute. [R. 142.] As heretofore noted, this action to compel arbitration of the back pay dispute was filed on June 25, 1968. Two days later the Union filed its own action to confirm the prior award and to compel arbitration of the back pay dispute, the latter action being brought on behalf of all successful grievants in the prior arbitration. At no time has Texaco contended that the back pay dispute was not "arbitrable"; its contention has always been limited to the assertion that *Bealmer and Brown* may not compel arbitration thereof.

Texaco's Motion for Summary Judgment was granted by the District Court on the procedural arbitrability

contentions of no standing, prior resolution, and time-bar.

The District Court Judgment was reversed by the Ninth Circuit on the ground that the points relied on by the District Court were matters of procedure to be decided by the Arbitrator and not the Court.

Reasons for Denying the Writ.

Petitioner rests its entire argument for granting the writ upon two gross misconceptions of fact, *i.e.*:

1. That the Bealmer and Brown back pay grievances had been settled between Texaco and the Union before Bealmer and Brown elected to proceed individually; and

2. That the right of Bealmer and Brown to proceed separately with their grievances stems from some general principle of law rather than upon the specific language of Article XIV of the collective bargaining agreement.

It was almost four months *after* Bealmer had elected to proceed individually with their back pay arbitrations that Texaco and the Union settled the Bealmer and Brown disputes on a no-recovery basis. In the nine months that preceded April 3, 1968, (and in the four months that followed that date) Texaco and the Union had been unable to resolve the back pay issue in the many cases, including those of Bealmer and Brown.

Petitioner quotes the case of *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), for the proposition that "the courts are the proper forum for the adjudication of questions concerning whether an obligation exists to arbitrate with the party seeking arbitration." (Petition, p. 6). Petitioner's summary of the *Wiley*

doctrine is both inaccurate and incomplete. *Wiley* stands for the proposition that matters of substantive arbitrability (*i.e.*, is there an agreement to arbitrate this kind of dispute between these parties?) are for the courts, whereas matters of procedural arbitrability "grow[ing] out of the dispute and bear[ing] on its final disposition should be left to the Arbitrator." (at p. 543).

We have no quarrel with Petitioner's contention that the court is the proper forum for determining whether the obligation to arbitrate is "with the party seeking arbitration." It is apparently Petitioner's position that even were the issues it raises considered "procedural" if raised against the Union, that they must be considered "substantive" issues since Bealmer and Brown, who are not parties signatory to the collective bargaining agreement, seek arbitration herein.

A reading of Article XIV of the collective bargaining agreement (attached Appendix "A") confirms that by the terms of the collective bargaining agreement, individual employees have every right given directly to their Union under the grievance-arbitration procedures of the agreement. In view of this co-equal treatment of employees with their Union (giving the employee the option to designate whether he wishes to proceed through the Union or individually), Petitioner's contention that it raises issues of substantive arbitrability because Respondents here are individuals and not the Union, has no merit.

Putting it positively, the dispute is plainly arbitrable between Texaco on the one hand and Bealmer and Brown on the other *because the collective bargaining agreement so provides*. Thus, *Black-Clawson Co. v. Int'l. Assn. of Machinists*, 313 F. 2d 179 at 185 (2d.

Cir., 1962) is wholly distinguishable in its determination that Section 9(a) of the Labor Management Relations Act does not confer "an individual right upon the individual employee to compel compliance with the grievance procedure up to and including any arbitration provision." Here we cite the collective bargaining agreement itself, not the Labor Management Relations Act as authority for the right of the individual to compel arbitration. Here a finding that the issues raised are for the court and not for the abitrator would require the same finding in a Union action to compel arbitration, since Union and individual employees are given identical rights under Article XIV of the agreement at the option of the employee.

Thus, the Circuit Court correctly notes that "the District court did not hold for Texaco on the ground that the Article XII dispute was not an arbitrable issue under the collective bargaining agreement. Each of the reasons the court relied upon went to matters of procedure. Since the parties were obligated to submit this dispute to arbitration, it is the arbitrator, and not the court, who is to decide questions of procedure." (Appendix "A" to Petition, page 3a.).

Thus, the District Court in concluding that Bealmer and Brown had "no standing to order Respondent [Petitioner here] to proceed to arbitration with respect to their back pay claims," was not holding that their claims were not arbitrable from a substantive standpoint *at their individual instance*, but was holding that procedurally as a result of acts or circumstances Bealmer and Brown had lost (or had failed to initially gain) standing to compel arbitration.

The question of substantive arbitrability is ordinarily a simple one, for an Employer "cannot be compelled to arbitrate if an arbitration clause does not bind it at all," in an obligation to petitioner. *John Wiley & Sons, Inc. v. Livingston, supra,* at page 544. Once the single hurdle of substantive arbitrability has been cleared, all remaining questions, *i.e.* matters of procedural arbitrability, "grow out of the dispute and bear on its final disposition [and] should be left to the Arbitrator." (*John Wiley & Sons, Inc. v. Livingston, supra,* at page 543.)

Texaco's concern over the effect of the Circuit decision on uniform national labor policy (Petition, page 7) is without foundation, since this concern rests squarely on two false assumptions, (1) that the right of Bealmer and Brown to have the dispute arbitrated can come only from the Labor Management Relations Act, wherein it rests directly upon the collective bargaining agreement, and (2) that Bealmer and Brown seek to undo a Texaco-Union negotiated settlement of their disputes, whereas the fact of the matter is that their election to proceed individually preceded said settlement by many months. In any event, the question of claim settlement, as well as the question of time-bar, are plainly procedural in nature and for the arbitrator, since each relates to the collective bargaining agreement, each is intertwined with the merits, and each arises only after the threshold issue of substantive "arbitrability" has been decided favorably to Respondents.

Rochester Telephone Corp. v. Communication Workers, 340 F. 2d 237 (2d Cir., 1965);

Local 824, Carpenters v. Brunswick Corp., 342 F. 2d 792 (6th Cir., 1965);

Palestine Telephone Co. v. Local 1506, Electrical Workers, I.B.E.W., 379 F. 2d 234 (5th Cir., 1967).

Even issues as to when the grievance arises are procedural and to be decided by the arbitrator alone. *Sterling Provision Corp. v. Butchers Union, Local 174* (N.Y. S. Ct., 1969) 71 LRRM 2046, as are issues of accord and satisfaction. *Galveston Maritime Assn. v. Longshoremen*, 234 F. Supp. 250 (1964).

Conclusion.

The petition for certiorari should be denied.

DATED: September 25, 1970.

Respectfully submitted,

JEROME SMITH, ESQ.,
Attorney for Edward L. Bealmer and Pat Brown, Respondents.

Of Counsel:
ARNOLD, SMITH & SCHWARTZ,

APPENDIX "A."

Article XIV.

SETTLEMENT OF GRIEVANCES

Any employee, or group of employes, may individually or through their representatives present grievances to Management.

If an employe believes himself to have been injured or treated unfairly by the Company by reason of the application of any of the provisions of this Agreement, he may seek redress as follows:

FIRST

He may take a complaint to the Superintendent. Such complaint shall be submitted within fifteen (15) calendar days of the occurrence of the cause therefor.

SECOND

If satisfaction is not obtained in that manner within forty-eight (48) hours after such complaint is made, he or his representative may, within seven (7) calendar days, refer the matter in writing to the District Sales Manager, who shall, within seven (7) calendar days after complaint has been received by him, render a decision in writing.

THIRD

If still dissatisfied with the results obtained, he or his representative may, within ten (10) calendar days after receipt of the decision of the District Sales Manager, appeal in writing to the Division Sales Manager, who shall, within ten (10) calendar days, render a decision in writing; provided, however, that this requirement shall apply only in the

event the complaining party, or his representatives, has also submitted in writing full and complete information and facts to the best of their knowledge respecting the basis for the complaint.

FOURTH

If still dissatisfied, he or his representative may, within fourteen (14) calendar days thereafter, notify the Division Sales Manager in writing of his desire to submit the matter to a Board of Review. Such notice shall set forth the particular provision or provisions of the Agreement that allegedly has been violated, it being understood that the jurisdiction of the Board of Review is expressly limited to the application of the Articles of this Agreement.

Within ten (10) calendar days of receipt of such notice by the Division Sales Manager, the complainant or his representative and the Division Sales Manager shall select the Board of Review, consisting of three men; one to be selected by the complainant or his representative, one to be selected by the Division Sales Manager and one by the two so selected. The two parties so selected shall jointly request the Director of the Federal Mediation and Conciliation Service to submit the names of five persons, one of whom will be selected as the third member of the Board of Review.

Within seven (7) days after receipt of the list of names submitted by the Director of the Federal Mediation and Conciliation Service, the complainant or his representative and the Company representative shall meet and each shall eliminate the name of two of the persons listed. the complainant or his representative having the first choice of rejection, and the remaining

person shall thereupon be selected as the third member of the Board of Review, and the two representatives shall jointly notify him of his selection.

The majority decision of such Board of Review so selected shall be final and binding upon both parties. The procedure to be followed by the Board of Review shall be its sole determination. In all cases of grievances presented to a Board of Review under this Article, the Company and the complainant or his representative will furnish to the other and the Board of Review all information in their possession necessary to a full understanding of the subject matter of the grievance.

Expenses incident to the Board of Review procedure shall be borne equally as follows:

(a) One-half by the Company; and (b) one-half by the complainant if acting on his own behalf, or by General Truck Drivers, Chauffeurs and Helpers Union —Local No. 692, if acting as his representative, except that each party shall pay the expense of its own representative. (R. 24-26).

Supreme Court, U.S.
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EDWARD L. BEALMER and PAT BROWN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

Respondents' Opposing Brief offers as its first argument for denying the writ the factual claim that respondents chose to proceed individually prior to the time the union and Texaco reached agreement (Opposing Br. 5). Indeed, respondents find it necessary to go so far as to label the contrary assertion "a flat misstatement of fact" (id. at 2).

The short answer is that the District Court expressly found that the union and Texaco agreed to the settlement formula for all of the employees involved on March 15, 1968 (Petition, Appendix B, p. 8a, Finding 14) and it was concededly not until April 3, 1968 that either respondent sought to repudiate his earlier designation of the union and to make an "election" to proceed "individually" (Op-

posing Br. 3). The decision of the Court of Appeals in no wise challenged the District Court's factual finding and its opinion is plainly predicated on the view that District Courts are precluded from denying arbitration even in the face of a prior settlement of the dispute.* The very fact that respondents have found it necessary to contradict the unchallenged District Court finding implicitly acknowledges the indefensibility of maintaining that an employee should be able to elect to have his union represent him in a multi-employee grievance negotiation and then be free to start his own proceeding if he is later dissatisfid with the terms of the collectively bargained resolution of the matter.

Respondents predicate their only other argument for denying the writ upon the provisions of Article XIV of the collective bargaining agreement, which they set forth in an appendix to their brief. Respondents characterize the provisions of this Article as "critical" (Opposing Br. 2). Once again, respondents' effort to uphold the decision of the Court of Appeals merely serves to underscore the fact that it is insupportable. The so-called "critical" provision is nowhere quoted, paraphrased or summarized in the opinion of that Court. The Court of Appeals nowhere indicated that it viewed Article XIV as a basis for distinguishing the *Black-Clawson* case or as a predicate for its decision. While Article XIV gave respondents the option of proceeding on their own or having the Union represent them, the Court of Appeals evidently recognized that since they elected to be represented by their union until after an agreement had been reached, the fact that respondents

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* When respondents sought, after the March 15th agreement between the union and Texaco, to repudiate their election of the union to represent them, Texaco temporarily delayed implementation of the agreement pending consideration of respondents' claims. To make it emphatically clear that it would not accept any such delay in Texaco's implementation, the Union brought the action referred to by respondents (Opposing Br. 2) and Texaco thereupon honored the agreement.

earlier could have proceeded differently than they did was of no moment. But the fact remains that respondents did opt for the union, and since all parties acted on this understanding in collective bargaining, respondents must be required to abide by their choice. Otherwise, labor-management relations would become chaotic.

In sum, it is respectfully submitted that the Opposing Brief in no way alters the vital importance of granting the writ, as described in the Petition, and furnishes no valid basis for denying it.

Respectfully submitted,

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